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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ALLEN DAVID SAUNDER
12 CDCR #K-76351

13 Plaintiff,

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15 vs.
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17 DR. DIETCH,
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19
20 Defendant.
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Civil No. 08-0748 IEG (CAB)

ORDER:

**(1) SUA SPONTE DISMISSING
COMPLAINT AS FRIVOLOUS
PURSUANT TO
28 U.S.C. § 1915(e)(2)(B)(i)
AND § 1915A(b)(1); and**

**(2) DENYING PLAINTIFF'S
MOTION TO PROCEED IN FORMA
PAUPERIS AS MOOT
[Doc. No. 2]**

23 Plaintiff Allen David Saunder, an inmate currently incarcerated at North Kern State
24 Prison located in Delano, California and proceeding pro se, has filed a civil rights Complaint
25 pursuant to 42 U.S.C. § 1983. In addition, Plaintiff has filed a Motion to Proceed *In Forma*
26 *Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2].

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1 **I. MOTION TO PROCEED IFP**

2 All parties instituting any civil action, suit or proceeding in a district court of the United
 3 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
 4 U.S.C. § 1914(a). An action may proceed despite a party's failure to prepay the entire fee only
 5 if the party is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
 6 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Prisoners granted leave to proceed IFP however,
 7 remain obligated to pay the entire fee in installments, regardless of whether the action is
 8 ultimately dismissed for any reason. *See* 28 U.S.C. § 1915(b)(1) & (2).

9 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act ("PLRA"), a
 10 prisoner seeking leave to proceed IFP must submit a "certified copy of the trust fund account
 11 statement (or institutional equivalent) for the prisoner for the six-month period immediately
 12 preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2). From the certified trust account
 13 statement, the Court must assess an initial payment of 20% of (a) the average monthly deposits
 14 in the account for the past six months, or (b) the average monthly balance in the account for the
 15 past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C.
 16 § 1915(b)(1); 28 U.S.C. § 1915(b)(4). That institution having custody of the prisoner must
 17 collect subsequent payments, assessed at 20% of the preceding month's income, in any month
 18 in which the prisoner's account exceeds \$10, and forward those payments to the Court until the
 19 entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

20 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.
 21 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to
 22 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust account statement shows that
 23 he has insufficient funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4)
 24 (providing that "[i]n no event shall a prisoner be prohibited from bringing a civil action or
 25 appealing a civil action or criminal judgment for the reason that the prisoner has no assets and
 26 no means by which to pay the initial partial filing fee."); *Taylor*, 281 F.3d at 850 (finding that
 27 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal of a prisoner's IFP case
 28 based solely on a "failure to pay . . . due to the lack of funds available to him when payment is

ordered.”). Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP [Doc. No. 2] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

II. INITIAL SCREENING PER 28 U.S.C. § 1915(E)(2)(B) AND § 1915A(B)

A. Standard of Review

The PLRA also obligates the Court to review complaints filed by all persons proceeding IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.” *See* 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any portion thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from defendants who are immune. *See* 28 U.S.C. § 1915(e)(2)(B) and § 1915A; *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.”); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (noting that 28 U.S.C. § 1915(e) “not only permits but requires” the court to sua sponte dismiss an *in forma pauperis* complaint that fails to state a claim); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However, 28 U.S.C. § 1915(e)(2) and § 1915A now mandate that the court reviewing an IFP or prisoner’s suit make and rule on its own motion to dismiss before effecting service of the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *See Calhoun*, 254 F.3d at 845; *Lopez*, 203 F.3d at 1127; *see also McGore v. Wrigglesworth*, 114 F.3d 601, 604-05 (6th Cir. 1997) (stating that sua sponte screening pursuant to § 1915 should occur “before service of process is made on the opposing parties”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing 28 U.S.C. § 1915A).

1 “[W]hen determining whether a complaint states a claim, a court must accept as true all
2 allegations of material fact and must construe those facts in the light most favorable to the
3 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
4 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”; *Andrews*, 398 F.3d at
5 1121. In addition, the Court has a duty to liberally construe a pro se’s pleadings, *see Karim-*
6 *Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988), which is “particularly
7 important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). In
8 giving liberal interpretation to a pro se civil rights complaint, however, the court may not
9 “supply essential elements of claims that were not initially pled.” *Ivey v. Board of Regents of*
10 *the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

11 As currently pleaded, it is clear that Plaintiff’s Complaint fails to state a cognizable claim
12 under 42 U.S.C. § 1983. Section 1983 imposes two essential proof requirements upon a
13 claimant: (1) that a person acting under color of state law committed the conduct at issue, and
14 (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by the
15 Constitution or laws of the United States. *See* 42 U.S.C. § 1983; *Nelson v. Campbell*, 541 U.S.
16 637, 124 S. Ct. 2117, 2122 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985)
17 (en banc).

18 Plaintiff’s Complaint fails to set forth with any specificity any allegations of a denial of
19 his constitutional rights. The allegations that are made in the Complaint are virtually
20 incomprehensible. Plaintiff’s Complaint consists of rambling statements that allege that the
21 State of California kidnaped him and caused him to suffer brain damage along with other
22 medical concerns. (Compl. at 3.) There are no named Defendants. To the extent that Plaintiff
23 intends these allegations to support an independent constitutional claim for relief under section
24 1983, the Court finds they are frivolous. A complaint is frivolous “where it lacks an arguable
25 basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Here, the Court
26 finds Plaintiff’s claims to be frivolous under 1915(e)(2)(B) because they lack even “an arguable
27 basis either in law or in fact,” and appear “fanciful,” “fantastic,” or “delusional.” *Neitzke*, 490
28 U.S. at 325, 328.

1 **III. Conclusion and Order**

2 Good cause appearing, **IT IS HEREBY ORDERED** that:

3 (1) Plaintiff's Complaint is **DISMISSED** as frivolous pursuant to 28 U.S.C.
4 § 1915(e)(2)(B)(i). Because it does not appear "at all possible that the plaintiff can correct the
5 defect(s)" of his pleading, further leave to amend is **DENIED** as futile. *See Cahill v. Liberty*
6 *Mut. Ins. Co.*, 80 F.3d 336, 339 (9th Cir. 1996) (denial of a leave to amend is not an abuse of
7 discretion where further amendment would be futile).


8 **IT IS FURTHER ORDERED** that:

9 (2) Plaintiff's Motion to Proceed *IFP* is **DENIED** as moot [Doc. No. 2].

10 The Clerk shall close the file.

11 **IT IS SO ORDERED.**

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13 **DATED: May 4, 2008**

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15 **IRMA E. GONZALEZ**, Chief Judge
16 **United States District Court**
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